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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1982

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LEVIS LEON ALDRIDGE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether a defendant in a capital prosecution who has successfully shown that the assistance rendered by counsel was ineffective must also show, in order to gain a new trial, that the deficient conduct of counsel was so prejudicial that it probably affected the outcome of the proceeding?

2. Whether the Florida Supreme Court's application of the Elledge rule in petitioner's case -- under which the Court failed to review the only aggravating circumstance found by the trial court -- violated petitioner's Eighth Amendment rights?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed December 22, 1982, upon which rehearing was denied on February 22, 1983.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida which is the subject of this petition has not yet been reported, but will be reported as Aldridge v. State, ___ So.2d___(Fla. 1983). It is set out in slip opinion form at pages 1a-8a of the Appendix filed separately with this petition. Rehearing with respect to this opinion was denied, and the order denying rehearing is set out at page 9a of the Appendix.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on December 22, 1982, and petitioner's timely motion for rehearing

was denied on February 22, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (3), petitioner having asserted below and asserting herein the deprivation of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. It further involves Section 921.141, Florida Statutes (1977), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety at pages 16a-17a the Appendix.

STATEMENT OF THE CASE

On October 17, 1974, petitioner was indicted for first degree murder with respect to the killing of a man named Robert Ward during the commission of an armed robbery on September 3, 1974. (R. 1-2)[1] Trial by jury was held January 6 through January 8, 1975, at the conclusion of which petitioner was convicted of

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[1]References to the various parts of the record herein will be designated as follows:

"R," for the record on appeal to the Florida Supreme Court from the judgment of conviction and sentence of death (Florida Supreme Court Case No. 46,958);

"T," for the transcript of pre-trial and trial proceedings in which petitioner was convicted and sentenced to death (Florida Supreme Court Case No. 46,958);

"RP," for the record on appeal to the Florida Supreme Court from the denial of post-conviction relief (Florida Supreme Court Case No. 61,673); and

"TP," for the transcript of proceedings pursuant to petitioner's motion for post-conviction relief (Florida Supreme Court Case No. 61,673).

first degree murder. (R. 81) The sentencing proceeding was conducted immediately thereafter, resulting in a jury recommendation of death. (R. 82) Petitioner was adjudicated guilty and sentenced to death on January 8, 1975. (R. 83-84)

Thereafter, petitioner appealed his conviction and sentence to the Supreme Court of Florida, and both were affirmed. Aldridge v. State, 351 So.2d 942 (Fla. 1977), cert. denied, 439 U.S. 882 (1978). On October 24, 1979, petitioner filed an Application for Relief Pursuant to Presnell v. Georgia[, 439 U.S. 14 (1978)] in the Supreme Court of Florida. The application was denied in an unreported order filed December 21, 1979 (Sundberg, J., dissenting), and this Court thereafter denied certiorari. Aldridge v. Florida, 449 U.S. 891 (1980).

During the pendency of his Presnell application, petitioner commenced the post-conviction proceedings which have led to the petition filed with the Court today. On November 2, 1979, petitioner filed a Motion to Vacate Judgment and Death Sentence pursuant to Fla.R.Crim.P. 3.850 in the trial court. (RP. 2-10) The motion to vacate was thereafter amended (RP. 37-45), and an evidentiary hearing was held December 8-9, 1981, with respect to petitioner's claim that his trial counsel had rendered ineffective assistance. It is this claim which is the subject of the first question presented to the Court in the instant petition.

Petitioner claimed that he was denied the effective assistance of counsel at trial because of counsel's substantial inability to and failure to prepare for trial. Because of counsel's (the public defender's) staggering caseload and the trial court's denial of a continuance, petitioner further claimed that counsel

failed to prepare for trial through no strategic choice but through the interference of the state. The evidence adduced in support of this claim overwhelmingly demonstrated that as a result of counsel's total lack of pre-trial preparation, petitioner, not unlike the petitioners in Powell v. Alabama, 287 U.S. 45 (1932), was deprived of "the guiding hand of counsel at every step in the proceedings against him." Id. at 69.

Shortly after his arrest on September 9, 1974, petitioner was found by the trial court to be indigent, and the Office of the Public Defender for the Nineteenth Judicial Circuit was appointed to represent him. (TP. 241) Thereafter, Assistant Public Defenders Wilkinson and Schopp were assigned to represent petitioner by the Public Defender, Elton Schwarz. Petitioner was indicted on October 17, 1974 (R. 1-2) and arraigned on October 21, 1974 (T. 2). By the date of his arraignment, petitioner had already recognized that his case was not being prepared adequately and so informed the court:

> "THE DEFENDANT: Your Honor, I can -- if I can get my witnesses and talk, and if the man would get the witnesses and talk to them, I am not guilty of this charge. I can't prove it myself. I am not guilty. I have got to have help. I realize the Public Defender's Office and everybody is busy, they have got a lot cases, and a lot of them to look after, but I am here on a serious charge. This is my life that is involved and I need every opportunity that is available to me to prove myself innocent."

(T.4)[2] Thereafter, on October 31, 1974, petitioner was again before

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[2]Petitioner's observations were well-founded, for in the five week period between the assignment of the public defender and petitioner's arraignment, virtually no investigation had been undertaken. The only actions take to prepare petitioner's case during this time were attempts to find various alibi witnesses describe by petitioner and to verify petitioner's finances at the time of the crime. (T.P. 243-244)

the court and he again asked that someone be appointed to defend him other than the Public Defender's Office. Petitioner explained that he believed that the Public Defender had too many cases and did not have sufficient time to devote to his case (T. 6). The trial court responded by saying that if petitioner were dissatisfied with the lawyers assigned to him he should talk to Mr. Schwarz, the Public Defender. The court also told petitioner that he could not appoint another lawyer to represent him (T. 7, 8).

Later that same day, petitioner was returned to the courtroom after he indicated he would not talk to Mr. Schopp or Mr. Wilkinson. Petitioner suggested he would be better off representing himself rather than accepting representation of lawyers who were not representing him properly (T. 10-12). On November 1, 1974, the trial court brought petitioner into chambers without counsel, and petitioner again informed the court that the lawyers appointed to represent him were not fully investigating the case or consulting with him. The trial court again informed petitioner he could not appoint another lawyer and told him that the Public Defender, Mr. Schwarz, would personally be present to represent him at trial. The court also told petitioner he could not go to trial without counsel and admonished him to work with his appointed lawyers and not create a disturbance at trial. (T. 17-19) The Public Defender's response to this situation was to reassign petitioner's case to himself even though his schedule was "such that I would not want to undertake the responsibility of assuring that he receives a fair trial on my own" (T. 10-11). (R. 40-41; TP. 164)

Because of his schedule at the time he took over the representation of petitioner, Mr. Schwarz informed the court that while he would personally be present at trial, he would be unable

to assume responsibility for the preparation of the case for trial. (R. 40-41; TP. 164)[3] Thus, as Mr. Schwarz further informed the court, he had no option but to assign the preparation of the case for trial to Willie Gary, a legal intern in his office, who was "the only other personnel available for preparation of this case for trial" (R. 40). Accordingly, Mr. Gary, who had just completed law school and was awaiting admission to the Florida bar (TP. 110-111), was put "in charge of the preparation of [petitioner's] case for trial" (R. 31). (TP. 166)[4] Despite this apparent delegation of responsibility to Mr. Gary, he testified that he did not perceive himself as in charge of anything since he was only an intern (TP. 113-114). He indicated that he did not really get involved in trying to prepare for trial until two or three weeks before it was scheduled (TP. 114-115). In addition, Mr. Gary had numerous other responsibilities during this period of time (TP. 155, 167). The only investigation Mr. Gary could recall was going to a bar with an investigator to look for witnesses (TP. 115-116).

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[3]During this critical period of time in petitioner's case, Mr. Schwarz's caseload was in the process of tripling. As he averred in his motion for a continuance,

> "On October 1, 1974 there were pending in the office of the undersigned Public Defender eight capital felony cases and one hundred and three non-capital felony cases. As of November 1, 1974, there were seven capital felony cases and one hundred fifty non-capital cases pending in said office; and on December 1, 1974 there were six capital felony cases pending and two hundred non-capital felony cases pending to be handled by the undersigned and six assistants along with an average of one hundred misdemeanor and juvenile cases per month. It is estimated that, at the present time, the case load has increased to almost three hundred capital and non-capital felony cases presently pending." (R. 40)

[4]Mr. Gary was admitted to the bar on December 20, 1974 (TP. 110), just seventeen days before trial began.

Because of these circumstances, Mr. Schwarz agreed in his testimony at the post-conviction hearing that little or no work was done in preparing the case for trial until the two or three week period before the trial began (TP. 114, 166).[5] No motions to suppress or in limine were filed, because counsel had not had sufficient time to assess whether such motions would be proper (TP. 185). No depositions were taken even though counsel believed depositions were essential in this case, and none of the State's evidence was examined prior to trial (TP. 116, 172-173, 237).[6] Further, there were at least thirty witnesses provided by the state to whom counsel had not talked and from whom statements had not been provided (TP. 175).

Mr. Schwarz testified unequivocally that as a result of their lack of pre-trial preparation, he and Mr. Gary were totally unprepared for the trial of petitioner's case (TP. 175). Mr. Schwarz further underscored this fact by testifying that he could not "ever recall going to trial even on a misdemeanor case in the state of readiness that we were at that time." (TP. 179) Because of these circumstances, Mr. Schwarz moved for a continuance of the trial four days before it was scheduled to begin (RP. 32-33, 39-41). On the day the trial was scheduled to begin, the motion was argued before the trial court, and Mr. Schwarz flatly asserted,

> "This case is not prepared. We are not in position to provide competent legal representation."

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[5]Mr. Schwarz did not personally become involved in trial preparation until at most two weeks before trial (TP. 166).

[6]While the state provided sworn statements from eight of the forty-five witnesses on their witness lists, neither counsel felt that these statements were a sufficient substitute for defense discovery depositions (TP. 118-119; 172-173). Further, Mr. Schwarz indicated that he had never gone to trial in a major case since his admission to the bar in 1954 without taking depositions (TP. 173).

(T. 26) Finding, nonetheless, that "[t]here has been ample time for everybody to be fully prepared," the trial court denied the motion for a continuance. (T. 26)

In sum, therefore, petitioner's evidence in support of his motion for post-conviction relief demonstrated that of the forty-five names of witnesses supplied by the state in its seven witness lists, only one had been investigated by the defense whatsoever and none were deposed; of the seven witnesses listed by the defense, only two had been spoken to by the defense; of the eighteen witnesses presented at trial, the defense had prior knowledge of only seven and then only from nonadversarial statements taken by the state; of the forty-one items of physical evidence introduced at trial, the defense had examined none and in fact had not been able to examine any of the physical evidence; that no motions, except form motions, were filed; that no real work was done on the case until a week or two before trial and that even this was superficial. Not surprisingly therefore, petitioner's evidence also demonstrated that his counsel was unable to provide effective representation at his trial. Counsel conducted admittedly seat-of-the-pants cross-examination, because he did not know the answers to questions he wanted to ask (TP. 198-199), frequently resulting in the admission of inadmissible evidence [e.g., threats to a witness (T. 337); collateral offenses (T. 578); petitioner's entire criminal record in specific detail (T. 436); petitioner's entire prison disciplinary record (T. 440); and petitioner's military AWOL's]. Counsel was unable to challenge any of the physical evidence (see T. 222, 237, 277); was unable to pinpoint descriptions, or what was said precisely by various witness, or relevant times, or alibi

(TP. 287-300). Counsel was unable to make any rational decisions regarding whether to put on witnesses regarding alibi or to investigate expert testimony (TP. 287-288). In short there were no defense tactics utilized at trial, because counsel had developed no information from which to make rational strategy decisions.

In the face of this uncontradicted record, the post-conviction trial court entered the following pertinent findings of facts and conclusions of law with respect to petitioner's claim that he had been denied effective assistance of counsel:

> "2. That defendant has detailed in his motion under Fla. R. Crim. P. 3.850 the specific omissions and overt acts upon which the claims of ineffective assistance of counsel are based.
>
> 3. That defendant has shown that the specific omission of trial counsels' failing to take pre-trial depositions upon oral examination of the State's main witnesses was a substantial and serious deficiency measurably below that of competent counsel.
>
> 4. That defendant has not shown that this specific deficiency of trial counsel's failing to take pre-trial depositions upon oral examination of the State's main witnesses, when considered under the circumstances of this individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that this deficient conduct effected [sic] the outcome of the trial.
>
> 5. That based upon the totality of the circumstances, defendant was not denied effective assistance of counsel at his trial for the crime of murder in the first degree."

(R.P. 76-77)

On appeal, the Supreme Court of Florida affirmed the trial court's denial of relief on the ineffective assistance claim, agreeing with the trial court that petitioner had failed to demonstrate sufficient prejudice as a consequence of counsel's concededly deficient representation. (Appendix 6a) With respect to the insufficiency of petitioner's demonstration of prejudice, the court

emphasized that

> "[a]ppellant has made no attempt whatever to present any evidence to indicate what information would have been elicited in taking the depositions which would have affected the outcome of his trial."

(Appendix 6a)

In his post-conviction proceeding, petitioner also claimed that the Florida Supreme Court's failure to review on direct appeal the only aggravating circumstance found by the trial judge -- that the homicide was especially heinous, atrocious, or cruel (R. 85-86) -- deprived him of critical Eighth Amendment safeguards against the arbitrary imposition of the death sentence. (RP. 6, 39)[7] The post-conviction trial court summarily rejected this ground in an order denying the Motion to Vacate Judgment and Sentence on June 18, 1981 (RP. 11). In an expedited appeal from this order, the Florida Supreme Court summarily reversed the trial court with the following order (set out in its entirety):

> "Upon review of the Record, the Application for Stay of Execution and the Response of the State, the order of the trial court is reversed and this cause is remanded for an evidentiary hearing with respect to the issue of effectiveness of trial counsel. Fla. R. App. P. 9.140(g)."

(Appendix 10a) On remand, the trial court held the evidentiary hearing and entered the order discussed supra (concerning ineffective assistance of counsel). On the appeal thereafter, petitioner briefed all the issues he had raised in his post-conviction motion -- not just the issue of ineffective assistance -- on the basis

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[7] In its review of petitioner's sentencing proceeding on direct appeal, the Florida Supreme Court expressly refused to review the aggravating circumstance found by the trial judge, holding that such review was "unnecessary... inasmuch as there were no mitigating circumstances [footnote omitted] and adequate aggravating circumstances to sustain the penalty." Aldridge v. State, supra, 351 So.2d at 944.

that the Florida Supreme Court's summary reversal of the trial court's first order denying post-conviction relief plainly meant that the issues unrelated to the issue of ineffective assistance were still pending in the Florida Supreme Court. In the opinion of the Florida Supreme Court, however, it had disposed of these issues with the order quoted supra:

> "We previously rejected all the other alleged defects in the instant case when we remanded appellant's initial Rule 3.850 motion for an evidentiary hearing on the issue of the effectiveness of trial counsel."

(Appendix 6a) Thus, the Florida Supreme Court decided the second question presented herein without saying anything explicitly about it.

REASONS FOR GRANTING THE WRIT

I.

A DEFENDANT IN A CAPITAL PROSECUTION WHO HAS SUCCESSFULLY SHOWN THAT THE ASSISTANCE RENDERED BY COUNSEL WAS INEFFECTIVE SHOULD NOT BE REQUIRED TO SHOW, IN ADDITION, IN ORDER TO GAIN A NEW TRIAL, THAT THE DEFICIENT CONDUCT OF COUNSEL WAS SO PREJUDICIAL THAT IT PROBABLY AFFECTED THE OUTCOME OF THE PROCEEDINGS.

As described in greater detail in the Statement of the Case, supra, in state post-conviction proceedings, petitioner claimed that he had been denied effective assistance of counsel at trial due to his trial counsel's total inability to and failure to prepare his case for trial. The state trial court and the Florida Supreme Court agreed that counsel's failure to prepare for trial did in one respect -- the failure to take pretrial depositions -- deprive petitioner of effective assistance of counsel. Even though this finding inaccurately and unfairly represented the scope of

the ineffectiveness of the assistance provided,[8] the finding would have been a sufficient basis upon which relief could have been granted had the Florida courts determined that the deficient conduct were sufficiently prejudicial to petitioner. Accordingly, petitioner's case strikingly presents the question of the degree of prejudice which must be shown to require reversal of a capital conviction for ineffective assistance of counsel.

In assessing the degree of prejudice which must be shown to require reversal of any conviction for ineffective assistance of counsel, the Florida Supreme Court requires a showing that the

> "specific, serious deficiency [of counsel], when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings."

Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). In petitioner's case, petitioner failed to make this showing of prejudice, for he

> "made no attempt whatever to present any evidence to indicate what information would have been elicited in taking the depositions which would have affected the outcome of the trial."

(Appendix 6a) Petitioner submits that the Knight test of prejudice and its particular application in this case present two critical questions concerning the proper analysis of claims of ineffective assistance of counsel which must be resolved by this Court.

First, petitioner's case clearly asks whether the "outcome

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[8] And thus, is not entitled to the presumption of correctness afforded in the federal courts by 28 U.S.C. §2254 (d). See 28 U.S.C. §2254(d)(8). Cf. Marshall v. Lonberger, No. 81-420, ___U.S.___, 51 U.S.L.W. 4113, 4116-4117 (February 22, 1983)

determinative" test of prejudice articulated in Knight is the proper test of prejudice in the constitutional analysis of any claim of ineffective assistance. This Court has already indicated the necessity of addressing the question of prejudice in the analysis of ineffective assistance claims by its recent grant of certiorari in United States v. Cronic, No. 82-660, ___U.S.___, 51 U.S.L.W. 3598 (February 22, 1983).[9] This case would be a helpful companion case to Cronic, since it presents one way of resolving the degree of prejudice issue -- through the utilization of an outcome determinative test. Although this Court has never squarely addressed the issue of the degree of prejudice which must be shown for a defendant to prevail upon a claim of ineffective assistance, it has in the past clearly indicated that some prejudice must be shown. See United States v. Morrison, 449 U.S. 361, 364-365 (1981). To the extent that the Court has addressed the degree of prejudice issue, all indications from the Court have been that the degree of prejudice shown -- at least in cases such as petitioner's which involve government/judicial interference with the ability of counsel to provide effective assistance -- need be no more than the demonstration of some "adverse effect" or of the threat of some adverse effect upon the effectiveness of counsel's representation.

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[9]The question presented in Cronic is whether the

> "... court of appeals correctly reverse[d] defendant's convictions on ground of ineffective assistance of counsel at trial, without identifying any act or omission by counsel that departed substantially from what reasonably competent criminal defense attorney would have done under the circumstances and without finding any prejudice to defendant?"

Ibid.

United States v. Morrison, supra, 449 U.S. at 365. See also, Geders v. United States, 425 U.S. 80, 88-89 (1976) (order preventing petitioner from consulting his counsel "'about anything'" during a 17-hour overnight recess between his direct - and cross-examination posed such a threat); Herring v. New York, 422 U.S. 853 (1975) (statute permitting the trial judge in a bench trial to deny right to make closing argument posed such a threat); Powell v. Alabama, 287 U.S. 45, 58-59 (1932) (compelling defendants to proceed to trial "within a few moments after counsel for the first time charged with any degree of responsibility began to represent them" posed such a threat).[10] Petitioner's proof, even as attenuated by the fact findings of the state courts, arguably met such a test of prejudice. However, the failure of his proof to meet the outcome determinative test applied by the Florida courts squarely presents the appropriateness of such a test to this Court.[11]

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[10] It should be noted as well that at least in Herring and Powell, the Court impliedly rejected the use of an outcome determinative test. Herring v. New York, supra, 422 U.S. at 864; Powell v. Alabama, supra, 287 U.S. at 58.

[11] It should also be noted that there is a conflict among the federal circuits and the state courts concerning the degree of prejudice issue. The United States Court of Appeals for the District of Columbia Circuit is the only court of appeals which has adopted the outcome determinative test, but even in that circuit, the continued adherence to that test is questionable. Compare United States v. DeCoster, 624 F.2d 196, 208 (D.C. Cir. 1979) (enbanc) (plurality opinion of Levanthal, J.) [adopting the outcome determinative test] with United States v. Wood, 628 F.2d 554, 559, 574 n. 82 (D.C. Cir. 1980) (en banc) (per curiam opinion joined by McGowan, Tamm, Leventhal, MacKinnon, Robb, and Wilkey, JJ.) (dissenting opinion of Baxelon, J., joined by Wright, C.J.) [turning away from the outcome determinative test] and United States v. Green, 680 F.2d 183, 188-189 (D.C. Cir. 1982) [explicity utilizing the outcome determinative test]. On the other hand, the United States Court of Appeals for the Eleventh Circuit -- which eventually reviews Florida convictions through habeas corpus proceedings -- has recently rejected the use of the outcome determinative test. See Washington v. Strickland 693 F.2d 1243, 1261-1262 (5th Cir. 1982) (Unit B). While the D.C. Circuit and, apparently, the Florida Supreme Court recognize that the outcome determinative test is too stringent a test of prejudice for

The second critical question presented by petitioner's case with respect to the proper analysis of claims of ineffective assistance of counsel involves the degree of prejudice which must be shown in a capital case. This Court's oft-and deeply-expressed concern that the processes by which guilt and sentencing determinations are made in capital cases be qualitatively more reliable than the same processes in non-capital cases, see, e.g., Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625, 637-638 (1980); Eddings v. Oklahoma, 455 U.S. 104, 118-119 (1982) (O'Connor, J. concurring), strongly suggests that the analysis of ineffective assistance claims in capital cases must reflect a proportionately greater degree of concern for the potential prejudice done to a defendant by the ineffective assistance of counsel in capital cases. Petitioner's case, again, strikingly presents this issue, for the state courts agreed that he did not receive the assistance of counsel which he was constitutionally entitled to receive. Whether the application of an outcome determinative test in capital cases is consistent with the Eighth Amendment is, therefore, also critically presented by this case.

Accordingly, the question presented by petitioner's case as to the degree of prejudice which must be shown in order for a capital defendant to prevail upon a claim of ineffective assistance of counsel is precisely the kind of question which this Court has described as warranting review, and certiorari should, therefore, be granted.

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footnote 11 continued:

ineffectiveness caused by government interference, see United States v. DeCoster, supra, 624 F.2d at 201; Valle v. State, 394 So.2d 1004, 1007-1008 (Fla. 1981), the Florida Supreme Court nonetheless applied the outcome determinative test in petitioner's case. Thus, the constitutional propriety of the Florida Supreme Court's resolve to adhere to the outcome determinative test -- even in a sea of conflict surrounding the appropriateness of that test -- can be no better presented than in this case.

II.

THE FLORIDA SUPREME COURT'S APPLICATION OF THE ELLEDGE RULE IN PETITIONER'S CASE -- UNDER WHICH THE COURT FAILED TO REVIEW THE ONLY AGGRAVATING CIRCUMSTANCE FOUND BY THE TRIAL COURT -- VIOLATED PETITIONER'S EIGHTH AMENDMENT RIGHTS.

In support of his decision to sentence petitioner to death, the trial judge found only one aggravating circumstance. Petitioner challenged this finding on his direct appeal. However, the Florida Supreme Court sidestepped petitioner's challenge (1) by itself finding two additional aggravating circumstances, and (2) with these findings -- coupled with the additional finding that there were no mitigating circumstances -- by holding that any error in the trial judge's assessment of aggravating circumstances was harmless. Petitioner submits that this process of "appellate review" in his case amounted to the appellate court's redetermination of his sentence. The process, therefore, presents a critical, unresolved question of Eighth Amendment law.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court held that the construction of an aggravating circumstance, as evinced by its application in a particular case, cannot be so vague or broad as to violate the requirements of Furman v. Georgia, 408 U.S. 238 (1972), that sentencing decisions be guided by clear, objective, rationally reviewable standards. Here, the only aggravating circumstance found by the trial judge -- that the homicide was especially heinous, atrocious, or cruel -- unquestionably did not pass the Godrey standards for specific guidance of sentencing discretion. According to the trial judge, the facts supporting

the finding of this single circumstance were the following: appellant carefully planned and prepared for the armed robbery in the course of which the victim was killed; the victim was a person who had been kind to appellant; the victim was killed by a single shotgun blast to the head; and appellant was a convicted felon on parole at the time of the homicide. (R. 85-86) Unquestionably, the construction of "especially heinous, atrocious or cruel" provided by its application to these facts is vague and overbroad when compared to the more limited construction utilized in other cases. See, e.g., State v. Dixon, 283 So.2d 1, 9(Fla. 1973) (holding that the circumstance must be based upon "additional acts" directed against the victim during the "actual commission of the capital felony," thus precluding consideration of the pre-crime acts of preparation, of the relationship between the defendant and the victim, and of the defendant's status as a previously convicted felon, all considered by the trial court here); Cooper v. State, 336 So.2d 1133 (Fla.1976), cert.denied, 431 U.S. 925 (1977) (re-affirming the Dixon construction of this circumstance); Williams v. State, 386 So.2d 538 (Fla. 1980)(finding of circumstance reversed where victim died almost instantaneously from gunshot wounds); Maggard v. State, 399 So.2d 973 (Fla. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 610 (1981) (finding of circumstance reversed where victim died quickly from single gunshot blast).

Because this was the only aggravating circumstance found by the trial judge, the court's improper consideration of it should have resulted in the vacation of petitioner's death sentence.

Godfrey v. Georgia, supra. However, the Florida Supreme Court avoided the required result by "finding" two additional aggravating circumstances which the trial court could have considered (but, according to his findings, chose not to) and by asserting that since the trial judge had found no mitigating circumstances, any error in finding the "heinous, atrocious or cruel" circumstance was harmless. (Appendix 14a)[12] The constitutionally required reversal of petitioner's death sentence cannot, consistent with the federal constitution, have been avoided by such judicial repair of the trial court's findings.

The trial judge based the death sentence solely upon the heinous, atrocious or cruel aggravating circumstance. Thus, if it had been stricken by the Florida Supreme Court as required, the sole basis for the trial court's imposition of the death sentence would also have been stricken, and the death sentence would necessarily have been reversed. See Godfrey v. Georgia, supra, 446 U.S. at 433. The reason for such a result is straightforward. Godfrey required that the sentencer's discretion be suitably guided, and if the only factor guiding the sentencer's discretion was too vague or broad to provide guidance, sentencing discretion was not suitably guided. Accordingly, under a Godfrey set of circumstances, even if an appellate court could find in the record

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[12] By this process, the Florida Supreme Court recast the case into the posture necessary for the application of the rule first expressly articulated in Elledge v. State, 346 So.2d 998 (Fla. 1977), which treats error in the assessment of aggravating circumstances as harmless if there are no mitigating circumstances.

additional factors which could have suitably guided the sentencer's discretion, this search would be to no avail, for the sentencer's discretion, as explicitly stated by the sentencer, would not have been guided by these additional factors.

Moreover, the Florida Supreme Court's attempt to avoid the requirements of Godfrey conflicted with the principles underlying Zant v. Stephens, ___ U.S. ___, 102 S. Ct. 1856 (1982). In Zant, the Supreme Court had been asked to decide "whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." ___ U.S. at ___, 102 S.Ct. at 1857. While the state law rule under review in Zant had been consistently stated and followed by the Georgia Supreme Court, that court had never explained the rationale for its rule. Id. at 1858. Because the state court's rationale for such a rule could

> "undermine the confidence [the Court] expressed in Gregg v. Georgia ... that the Georgia capital sentencing system, as [the Court] understood it then, would avoid the arbitrary and capricious imposition of the death penalty ..."

id. at 1859, the Court certified a question to the Georgia Supreme Court relative to the state law premises underlying its rule. Ibid. While there has been no final resolution of the merits in Zant, the decision certifying a question to the Georgia Supreme Court with respect to a rule quite similar to the Elledge rule suggests the constitutional infirmity of such a rule. Zant makes clear that the facial validity of the Georgia death penalty statute

could well be undermined by the appellate court's assumption of the role of sentencer. Id. at 1858-1859.

By its affirmance of petitioner's death sentence, however, the Florida Supreme Court strikingly assumed precisely such a role. The Court found two aggravating circumstances which the sentencer chose not to find. Further, the court held that in the absence of any mitigating circumstances, any erroneous assessment of the "heinous, atrocious or cruel" aggravating circumstance would not have led the sentencer to impose a death sentence improperly.[13] With the sweep of its "appellate" hand, the Florida Supreme Court thus performed a sentencing function. It decided that if the trial judge had considered aggravating circumstances which he did not choose to consider, and if he had not considered the aggravating circumstance which he did choose to consider, and if he had found none instead of some mitigating circumstances, a death sentence would still have been imposed. Such speculation about the sentencer's exercise of

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[13] In finding that there were no mitigating circumstances, the Florida Supreme Court also contravened the sentencing judge's findings, for the sentencing judge had found that the aggravating circumstance "far outweigh[ed] any mitigating circumstances shown by the evidence and which must be considered by the Court." While the judge had not detailed any of the mitigating circumstances which were thus outweighed, the very same allusion to the existence of such circumstances was sufficient in Elledge for the Florida Supreme Court to hold that the trial judge must have considered mitigating circumstances, thereby making the erroneous assessment of aggravating circumstances in Elledge harmful. 346 So.2d at 1003.

discretion under entirely different circumstances is not "review" of sentencing discretion, but is instead, the exercise of such discretion. Because such a result would clearly undermine the confidence expressed in Proffitt v. Florida, 428 U.S. 242 (1976), that the Florida capital sentencing system, as it was then understood, would avoid the arbitrary and capricious imposition of the death penalty, certiorari as requested herein, must be granted.[14]

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[14]While the Florida Supreme Court's assumption of the role of sentencer was not nearly as clear in Barclay v. State, 343 So.2d 1266 (Fla. 1977), sent. vacated and remanded, 362 So.2d 657 (Fla. 1978), app. after resentencing, 411 So.2d 1020 (Fla. 1982), this Court's recent grant of certiorari in Barclay [___ U.S. ___, 103 S. Ct. 340 (1982)] may well bring before the Court this very issue. Because of such a possibility, at the very least the certiorari decision in the petitioner's case should be held pending Barclay. See, e.g., Davis v. Georgia, Spraggins v. Georgia, Collins v. Georgia, Baker v. Georgia, Hamilton v. Georgia, Brooks v. Georgia, 446 U.S. 961 (1980) [cases held pending the decision in Godfrey v. Georgia, supra].

CONCLUSION

For the reasons expressed herein, the petitioner, LEVIS LEON ALDRIDGE, respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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